JUDICIAL CONTROL OVER RULES OF LEGISLATIVE PROCEDURE. — In determining what is the existing statute law, an English court seeks only the actual expression of the legislative will, although that expression is not in the form required by previous statutes. To the extent of the inconsistency the earlier acts must be deemed repealed.[1] What Parliament has in fact enacted has for centuries been finally determined by inspection of the parliamentary records in Chancery.[2] Faulty records must be corrected by Parliament.

In this country the limitations on legislative power contained in the written constitutions have caused confusion. Primarily, there is the well-recognized doctrine that if the subject matter of a statute conflicts with constitutional provisions, to that extent the courts will declare the statute void. If a court decides that an act, for example, impairs the obligation of contracts, it holds that the statute is void on its face. But if it declares a statute void as not having been passed according to the rules of legislative procedure established by the constitution, it must look at something besides the constitution and the act as enrolled and recorded; for the contents of the latter give no clue to the manner of its enactment. The question then arises, has a court a right to look behind the enrolled act?

Many courts have decided that the enrolled act is not conclusive.[3] Their reasoning has been as follows: the constitution has directed the legislature to follow certain rules; failure to conform makes the act *ultra vires;* it is the duty of the court to declare an unconstitutional statute void.[4] Such decisions have assumed that the determination of whether a bill has gone through all the procedure laid down by the constitution as a condition precedent to its becoming a law, is a judicial question. But it is a recognized principle of constitutional law that in some questions the judiciary must abide by the determination of another department of government.[5] It seems clear that it is the special duty of the legislature to decide whether it has actually enacted a law, and that its certificate to that effect should conclude the courts. This is universally recognized to the extent of admitting that the actual existence of an act and its passage according to rules cannot be tried by parol evidence.[6] Some record must be taken as the basis of judicial knowledge. Because the constitution orders certain facts to appear in the journals of the houses, many courts have held that these are constituted the final record.[7] Thus a recent case declared void a duly enrolled act, because the yeas and nays of the final vote in each house had not been

[1] This follows directly from the sovereignty of Parliament. The same is true in this country where the rule was made by an earlier statute only. McDonald *v.* State, 80 Wis. 407.

[2] The King *v.* Arundel, Hob. 109. See Edinburgh Ry. Co. *v.* Wauchope, 8 Cl. & F. 710. The records for private acts are the Rolls of Parliament.

[3] Perry *v.* Baltimore & Drum Point R. R. Co., 41 Md. 446; Spangler *v.* Jacoby, 14 Ill. 297; Wells *v.* Missouri Pac. Ry. Co., 110 Mo. 286.

[4] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., ch. vi.

[5] Luther *v.* Borden, 7 How. (U. S.) 1; *In re* Legislative Adjournment, 18 R. I. 824.

[6] State *ex rel.* Herron *v.* Smith, 44 Oh. St. 348; Wise *v.* Bigger, 79 Va. 269.

[7] Board of Supervisors of Ramsey County *v.* Heenan, 2 Minn. 330; Commissioners of Stanley County *v.* Snuggs, 121 N. C. 394. *Contra,* Field *v.* Clark, 143 U. S. 649; Pangborn *v.* Young, 32 N. J. L. 29; State *ex rel.* Reed *v.* Jones, 6 Wash. 452; Lafferty *v.* Huffman, 99 Ky. 80.

entered in the journals, as directed by the state constitution. *Rash* v *Allen*, 76 Atl. 370 (Del.). Of course if the constitution directs the courts to consider the journals the final record and to declare an act void if certain facts do not appear therein,[8] they must obey; but that is not the better interpretation of a provision that a bill shall not become a law unless there be certain entries. For since the legislature can falsify the journals, the change from the record as established by custom would accomplish nothing. And it is submitted that the determination of whether the constitutional rules of legislative procedure have been followed is a political question. The vital function of the legislature is to enact laws, and it is not natural that the judiciary should be supervisors of a coördinate department's performance of its peculiar duty.[9]

DEVICES FOR SECURING IN SUBSTANCE DIRECT ELECTION OF UNITED STATES SENATORS. — The framers of the Federal Constitution undoubtedly intended that the state legislatures should exercise a deliberative choice in electing United States senators.[1] Yet many schemes have been devised for defeating that intention. Doubtless, from the very first, individual candidates for the legislature pledged themselves to support a particular candidate for the Senate. Frequently a party convention indorses one candidate for senator, and it is understood in advance that if that party has a majority in the legislature its nominee will be senator as a matter of course. Where, as in the famous race between Abraham Lincoln and Stephen A. Douglas, the question of electing a senator overshadows all other issues, the election of senators is practically direct.[2] Direct election may be even more nearly approached when the party nominee is chosen by direct primary. In the recent case of *State ex rel. Van Alstine* v. *Frear*, 125 N. W. 961 (Wis.), it was properly held that a statute providing for such direct primaries is constitutional, since they amount to no more than a petition; for the members of the legislature have the legal and, in the opinion of the Wisconsin court, the moral right to disregard the result if they see fit. At the regular elections in Oregon, the voters of all parties express a choice for senator from among the different party nominees for that office, and provision is made for a formal pledge by candidates for the legislature to abide by the result of the popular vote.[3] When such a pledge is prescribed as a requisite for eligibility to the legislature the line of constitutionality

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[8] Where the constitution provided that notice of application for special acts should be given, that the legislature should prescribe the time and place of giving notice, the evidence thereof, and how such evidence should be preserved, it was held to mean that whether or not notice had been given was a judicial question. Ewing *v.* Trenton, 57 N. J. L. 318.

[9] See Field *v.* Clark, *supra;* Pangborn *v.* Young, *supra;* State *ex rel.* Jones *v.* Reed, *supra.*

[1] See 2 GILPIN, MADISON PAPERS, *passim*, especially 812–821; 12 LODGE, WORKS OF HAMILTON, 126, 129.

[2] See 2 NICOLAY AND HAY, ABRAHAM LINCOLN, 136.

[3] BELLINGER AND COTTON, ANNOTATED CODE AND STATUTES, 957; GENERAL LAWS (1905), 19.